

Chapter 15: Review of Referee's Recommended Findings & Conclusions

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In this chapter. . .

This chapter discusses the authority of “juvenile court” referees and the hearings they may conduct if no demand for a judge or jury trial has been made. The chapter also states the procedural requirements for requesting review of a referee’s recommended findings and conclusions following a hearing.

For discussion of judge or jury trial demands, see Section 9.5.

15.1 Hearings a Judge Must Conduct

A judge must conduct a jury trial. MCR 3.912(A)(1).

A judge may conduct a nonjury trial if a proper demand has been made. Parties have a right to a judge at a hearing on the formal calendar. MCR 3.912(B). MCR 3.903(A)(10) defines “formal calendar” as judicial proceedings other than a preliminary inquiry or a preliminary hearing. However, a party who fails to make a timely demand for a judge to serve as factfinder may find that a referee will conduct the trial and all further proceedings, and that the right to demand a judge has been waived. MCR 3.913(B) provides that unless a party has demanded a trial by judge or jury, a referee may conduct the trial and further proceedings through disposition.

15.2 Hearings a Referee May Conduct

MCR 3.913(A)(1) states that “the court may assign a referee to conduct a preliminary inquiry or to preside at a hearing other than [a jury trial, which a judge must conduct], and to make recommended findings and conclusions.” In addition, MCR 3.913(A)(2)(b) lists the types of hearings that attorney referees and non-attorney referees may conduct. That rule states as follows:

“(b) *Child Protective Proceedings*. Only a person licensed to practice law in Michigan may serve as a referee at a child protective proceeding other than a preliminary inquiry, preliminary hearing, a progress review under MCR 3.974(A), or an emergency removal hearing under MCR 3.974(B).”

Thus, the Family Division may assign an attorney referee or non-attorney referee to conduct the following types of proceedings discussed in this benchbook:

- Non-attorney referees may conduct preliminary inquiries, preliminary hearings, progress reviews, and emergency removal hearings.
- Attorney-referees may conduct preliminary inquiries, preliminary hearings, hearings to review a child’s placement, bench trials, initial disposition hearings, progress reviews, review hearings, emergency removal hearings, permanency planning hearings, termination of parental rights hearings, and post-termination review hearings.
- An attorney referee may conduct a contempt hearing but may not issue an order holding a person in contempt of court. *In re Contempt of Steingold (In re Smith)*, 244 Mich App 153, 157 (2000).

15.3 Referees’ Authority

MCL 712A.10(1) sets forth the authority of a referee in proceedings under the Juvenile Code, MCL 712A.1 et seq. MCL 712A.10(1) states as follows:

“(1) Except as otherwise provided in subsection (2),* the judge of probate may designate a probation officer or county agent to act as referee in taking the testimony of witnesses and hearing the statements of parties upon the hearing of petitions alleging that a child is within the provisions of this chapter, if there is no objection by

*MCL 712A.10(2) applies to delinquency proceedings.

parties in interest. The probation officer or county agent designated to act as referee shall do all of the following:

- (a) Take and subscribe the oath of office provided by the constitution.
- (b) Administer oaths and examine witnesses.
- (c) If a case requires a hearing and the taking of testimony, make a written signed report to the judge of probate* containing a summary of the testimony taken and a recommendation for the court's findings and disposition."

In *In re AMB*, 248 Mich App 144 (2001), the Court of Appeals emphasized that referees do not have authority to enter orders:

"Neither the court rules nor any statute permits a hearing referee to enter an order for any purpose. In fact, that a hearing referee must make and sign a report summarizing testimony and recommending action for a judge reveals that the Legislature specifically denied referees the authority to enter orders, no matter their substance.

"To paraphrase the Michigan Supreme Court in *Campbell v Evans*,[358 Mich 128, 131 (1959)], we do not doubt that hearing referees play an extremely valuable role in the operation of the family courts, especially when attempting to handle emergency cases. However, a hearing referee's recommendations and proposed order *cannot* be accepted without judicial examination. 'They are a helpful time-saving crutch and no more. The responsibility for the ultimate decision and the exercise of judicial discretion in reaching it still rests squarely upon the trial judge' and may not be delegated. Consequently, when it is apparent that someone other than a judge made the substantive legal decision in a case, the only appropriate appellate response is to reverse." *AMB, supra* at 217–18. (Footnotes omitted; emphasis in original.)

Note: It is unclear whether a referee's recommendation to a judge has the force and effect of an order prior to a judge's entry of an order. For example, a referee may recommend that a child be taken into protective custody pending preliminary hearing, but a judge may not be present to sign an order authorizing such action until later. In such circumstances, the need for immediate action may necessitate treating the referee's recommendation as though it were an order.

*The Family Division now has jurisdiction over proceedings under the Juvenile Code. See MCL 600.1009 (references to the former juvenile division of probate court should be construed as references to the Family Division).

A chief referee is not required to review a hearing referee's recommended findings and conclusions, nor may a chief referee alter a hearing referee's recommendations prior to review by a judge. *In re Chambers*, unpublished opinion per curiam of the Court of Appeals, September 29, 2000 (Docket No. 223128).

Referees are bound by the rules governing the Judicial Tenure Commission and the Michigan Code of Judicial Conduct. MCR 9.201(B)(2), MCR 9.205, and JI-19 (1990).

15.4 Required Summary of Testimony and Recommended Findings and Conclusions

MCL 712A.10(1)(c) provides that if a case requires a hearing and the taking of testimony, the referee must make a written signed report to the judge containing a summary of the testimony taken and a recommendation for the court's findings and disposition. Similarly, MCR 3.913(A)(1) requires a referee to "make recommended findings and conclusions."

15.5 Advice of Right to Seek Review of Referee's Recommended Findings and Conclusions

MCR 3.913(C) provides that a referee must advise the parties of the right to request that a judge review the referee's recommended findings and conclusions. That rule states as follows:

"(C) Advice of Right to Review of Referee's Recommendations. During a hearing held by a referee, the referee must inform the parties of the right to file a request for review of the referee's recommended findings and conclusions as provided in MCR 3.991(B)."

15.6 Judicial Review of Referee's Recommended Findings and Conclusions

MCR 3.991(A)(1) states that "[b]efore signing an order based on a referee's recommended findings and conclusions, a judge of the court shall review the recommendations if requested by a party in the manner provided by [MCR 3.991(B)]."

15.7 Procedural Requirements

MCR 3.991(B) and (C) contain the procedural requirements for filing and serving a request for review of a referee's recommendations and a response to a request for review. These subrules state as follows:

“(B) *Form of Request; Time.* A party's request for review of a referee's recommendation must:

- (1) be in writing,
- (2) state the grounds for review,
- (3) be filed with the court within 7 days after the conclusion of the inquiry or hearing or within 7 days after the issuance of the referee's written recommendations, whichever is later, and
- (4) be served on the interested parties by the person requesting review at the time of filing the request for review with the court. A proof of service must be filed.

“(C) *Response.* A party may file a written response within 7 days after the filing of the request for review.”

“If no . . . request [for review] is filed within the time provided by subrule (B)(3), the court may enter an order in accordance with the referee's recommendations.” MCR 3.991(A)(2).

15.8 Time Requirement for Judge's Consideration of Request

MCR 3.991(A)(3)–(4) provide a mechanism for immediate review of a referee's recommendations. Those rules state:

“(3) Nothing in this rule prohibits a judge from reviewing a referee's recommendation before the expiration of the time for requesting review and entering an appropriate order.

“(4) After entry of an order under subrule (A)(3), a request for review may not be filed. Reconsideration of the order is by motion for rehearing under MCR 3.992.”*

*See Section 12.13.

There are time limits for a judge's consideration of a request for review only if a child is in placement. If a child remains in his or her own home, there is no time limit for consideration of the request. “Absent good cause for delay, the judge shall consider the request within 21 days after it is filed if the

minor is in placement The judge need not schedule a hearing to rule on a request for review of a referee's recommendations." MCR 3.991(D). See also MCR 3.991(F), which assigns a court discretion to hold a hearing before ruling on a request for review.

15.9 Stay of Proceedings

MCR 3.991(G) provides that the court may stay an order pending its decision on review of a referee's recommendations.

15.10 Standard of Review

MCR 3.991(E) sets forth the standard of review of a referee's recommended findings and conclusions. That rule states:

"(E) *Review Standard*. The judge must enter an order adopting the referee's recommendation unless:

"(1) the judge would have reached a different result had he or she heard the case; or

"(2) the referee committed a clear error of law which

(a) likely would have affected the outcome, or

(b) cannot otherwise be considered harmless."

15.11 Remedies

MCR 3.991(F) states that "[t]he judge may adopt, modify, or deny the recommendation of the referee, in whole or in part, on the basis of the record and the memorandums prepared, or may conduct a hearing, whichever the court in its discretion finds appropriate for the case."